

1 HONORABLE RICHARD A. JONES
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14 UNITED STATES DISTRICT COURT
15 WESTERN DISTRICT OF WASHINGTON
16 AT SEATTLE

17 DONTE MCCLELLON,

18 Plaintiff,
19 v.
20 CAPITAL ONE BANK, NA, et al.,
21 Defendants.

CASE NO. C19-00446-RAJ

**ORDER GRANTING
MOTION TO DISMISS**

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23 This matter is before the Court on Defendants' motion to dismiss Plaintiff's first
24 amended complaint. Dkt. # 33. For the following reasons the Court **GRANTS** the
25 motion.

I. BACKGROUND

2 On March 26, 2019, Plaintiff Donte McClellon filed this action against Defendants
3 Capital One Bank, Kellen Andrew Hade, and Miller Nash Graham & Dunn LLP. Dkt. #
4 1-1. Plaintiff also submitted an application to proceed *in forma pauperis*. Dkt. # 1. The
5 Honorable Michelle L. Peterson granted the application. Dkt. # 4. On December 5,
6 2019, Defendants Kellen Andrew Hade and Miller Nash Graham & Dunn LLP moved to
7 dismiss, arguing the complaint failed to state a claim for relief and the Court lacked
8 subject matter jurisdiction. Dkt. # 13. The Court granted the motion, noting that
9 diversity appeared to be lacking because Plaintiff and Defendant Kellen Andrew Hade
10 are both residents of Washington. The Court gave Plaintiff leave to amend and correct
11 the jurisdictional defect. Dkt. # 29. On January 22, 2020, Plaintiff filed an amended
12 complaint in which he alleges that his “domicile is the state of California” and that
13 complete diversity exists. Dkt. # 31. Plaintiff also amended his defamation claim to
14 incorporate additional allegations. Dkt. # 31 at ¶ 2.1. Defendant moves to dismiss
15 Plaintiff’s amended complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6).
16 Dkt. # 33.

II. DISCUSSION

18 Fed. R. Civ. P. 12(b)(6) permits a court to dismiss a complaint for failure to state a
19 claim. The rule requires the court to assume the truth of the complaint's factual
20 allegations and credit all reasonable inferences arising from those allegations. *Sanders v.*
21 *Brown*, 504 F.3d 903, 910 (9th Cir. 2007). A court "need not accept as true conclusory
22 allegations that are contradicted by documents referred to in the complaint." *Manzarek v.*
23 *St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). The plaintiff must
24 point to factual allegations that "state a claim to relief that is plausible on its face." *Bell*
25 *Atl. Corp. v. Twombly*, 550 U.S. 544, 568 (2007). If the plaintiff succeeds, the complaint
26 avoids dismissal if there is "any set of facts consistent with the allegations in the
27 complaint" that would entitle the plaintiff to relief. *Id.* at 563; *Ashcroft v. Iqbal*, 556 U.S.

1 662, 679 (2009).

2 A court typically cannot consider evidence beyond the four corners of the
 3 complaint, although it may rely on a document to which the complaint refers if the
 4 document is central to the party's claims and its authenticity is not in question. *Marder v.*
 5 *Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). A court may also consider evidence subject to
 6 judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). Because
 7 Plaintiff is proceeding *pro se*, the Court must construe his pleading liberally, and the
 8 pleading, "however inartfully pleaded, must be held to less stringent standards than
 9 formal pleadings drafted by lawyers[.]" *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)
 10 (citation omitted). Nonetheless, *pro se* litigants are still "bound by the rules of
 11 procedure." *Ghazali v. Moran*, 46 F.3d 52, 54 (9th Cir. 1995).

12 **A. Defamation Claim**

13 Plaintiff alleges Defendants defamed him by filing pleadings in a separate civil
 14 action pending in this district (18-cv-00909-JCC (the "original action")) in which
 15 Defendants falsely alleged Plaintiff sent emails which Plaintiff claims he did not send.
 16 Dkt. # 31 at ¶ 2.1. To state a valid defamation claim, Plaintiff must allege: (1) a false
 17 statement, (2) publication, (3) fault, and (4) damages. *Herron v. KING Broad. Co.*, 112
 18 Wash.2d 762, 768 (1989). Defendants argue that the allegedly defamatory statements
 19 were never "published" and, even if they were, the statements were made in the course of
 20 litigation rendering them privileged as a matter of law.

21 The Court need not consider the issue of publication because the allegedly
 22 defamatory statements are clearly privileged. Statements are privileged if they are made:
 23 (1) in good faith, (2) if there is an interest to be upheld, (3) if the statement was limited in
 24 its scope to this purpose, (4) if the statement was made at a proper occasion, and (5) if
 25 publication was made in a proper manner to the appropriate parties only. *Allstate Ins. Co.*
 26 *v. Tacoma Therapy, Inc.*, No. 13-CV-05214-RBL, 2014 WL 1494100, at *4 (W.D. Wash.
 27 Apr. 16, 2014). Statements made during the course of, and relevant to, judicial

1 proceeding are subject to absolute privilege. *See Story v. Shelter Bay Co.*, 52 Wash. App.
 2 334, 338 (1988). This privilege applies when authorities have the power to discipline
 3 with sanctions or strike impermissible statements from the record. *Id.* In-court
 4 statements or out-of-court statements that are pertinent or material to the redress or relief
 5 sought are subject to the privilege. *Demopolis v. Peoples Nat. Bank of Washington*, 59
 6 Wash. App. 105, 109 (1990).

7 Here, the allegedly defamatory statements were filed in an opposition brief (and
 8 accompanying declaration) submitted in response to Plaintiff's application to proceed *in*
 9 *forma pauperis* in the original action. *See* Dkt. # 31 at ¶ 2.1. Those pleadings were
 10 directly relevant to relief sought by Plaintiff in the original action and subject to that
 11 court's authority to impose sanctions or strike the statements if necessary. Thus, the
 12 allegedly defamatory statements are privileged.

13 After this Court's last dismissal order, Plaintiff attempted to address this fatal
 14 defect by incorporating a new allegation that "there is no absolute immunity applicable in
 15 this case nor is it subject to absolute privilege." Dkt. # 31 at ¶ 2.1. Although the Court
 16 must accept as true a complaint's well-pled facts, conclusory allegations of law and
 17 unwarranted inferences will not defeat an otherwise proper Rule 12(b)(6) motion.
 18 *Vasquez v. L.A. County*, 487 F.3d 1246, 1249 (9th Cir. 2007); *Sprewell v. Golden State*
 19 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Plaintiff's conclusory assertion that the
 20 allegedly defamatory statements are not privileged will not salvage this claim.

21 Plaintiff also mistakenly relies on this Court's October 23, 2019 order finding that
 22 his complaint was sufficient to survive a §1915(e)(2) *sua sponte* screening, as somehow
 23 immunizing his complaint from dismissal. But as this Court previously explained to
 24 Plaintiff, "the *sua sponte* screening and dismissal procedure is cumulative of, and not a
 25 substitute for, any subsequent Rule 12(b)(6) motion that [a defendant] may choose to
 26 bring." Dkt. # 8 at 2 (citing *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D. Cal.
 27

1 2007)).¹ Because Plaintiff's defamation claim is deficient as a matter of law,
 2 Defendants' motion to dismiss is GRANTED.

3 III. CONCLUSION

4 Dismissal of a *pro se* complaint without leave to amend is proper only if it is clear
 5 that the deficiencies cannot be cured by amendment. *Terrell v. JPMorgan Chase Bank*
 6 N.A., C14-930 MJP, 2014 WL 5449729, at *1 (W.D. Wash. Oct. 24, 2014) (citing
 7 *Flowers v. First Hawaiian Bank*, 295 F.3d 966, 976 (9th Cir. 2002)). "A district court,
 8 however, does not abuse its discretion in denying leave to amend where amendment
 9 would be futile." *Id.* Here, the Court finds that further amendment would be futile.
 10 Plaintiff has had two opportunities to amend his complaint and his defamation claim
 11 continues to suffer from the same fatal defect that cannot be cured by amendment.
 12 Accordingly, Plaintiff's first amended complaint is **DISMISSED** with prejudice. Dkt. #
 13 31. Defendants' motion is **GRANTED**. Dkt. # 33.

14 Dated this 28th day of April, 2020.



15
 16 The Honorable Richard A. Jones
 17 United States District Judge
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23 ¹ Plaintiff separately objects to Defendants' purported failure to comply with the meet
 24 and confer requirement in the Court's standing order. Dkt. # 35. Although this Court has
 25 expressed a *preference* that meet and confers occur in person, this is not a requirement.
 26 Defendants' counsel certified that they attempted to call Plaintiff, but he did not return
 27 their call. Dkt. # 33 at 1-2. Plaintiff contends that Defendants did not "even attempt" to
 meet and confer in person with him. Dkt. # 35 at 2. Even assuming this is true, the Court
 does not find this is a basis to strike the motion.